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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. .....

BURLINGTON TRANSPORTATION COMPANY,
PETITIONER,

vs.

EARL C. STOLTZ, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, and SUPPORTING BRIEF.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioner's bus was involved in an accident in Utah, resulting in the death of Donald Stoltz, who was the son of Respondent, Earl C. Stoltz. The Respondent is a citizen of Colorado, as was deceased. Respondent sued in the United States District Court for the District of Colorado, for $25,000. The Colorado death statute limits recovery to a maximum

of $5,000. The Utah constitution and statute places no limitation on the amount of damages.

Petitioner filed a motion in the District Court seeking to limit the damages to $5,000, on the grounds that the laws of Utah, upon which the action was based, were opposed to and incompatible with the declared public policy of the laws of the State of Colorado, and that any general rule of comity does not apply in view of such declared public policy of Colorado.

The District Court judge held that at the proper time he would instruct the jury that recovery, if any, cannot exceed the maximum of $5,000.

Next came the pre-trial conference where Petitioner stated that it was willing to pay $5,000 and costs, and that a trial was therefore not necessary. Judgment was accordingly entered against Petitioner for $5,000 and costs, over Respondent's objections.

Respondent appealed to United States Court of Appeals, Tenth Circuit, from the judgment limited to $5,000 and costs, where, on December 15, 1949, it was held that the laws of Utah govern the amount of damages, and the trial court was reversed and the case remanded. Thereafter, a mandate for the trial was issued, and the trial court set a further pre-trial conference for February 16, 1950. Petitioner ordered the record from the clerk of the United States Court of Appeals for the purpose of this Petition, and the pre-trial conference was vacated, but Respondent is seeking to have it reinstated.

BASIS OF JURISDICTION.

This Court's jurisdiction is invoked under Revised Rules of the Supreme Court of the United States, Rule 38, Section 5, and 5 (b) under which Petitioner contends that the Court of Appeals has decided an important question of

local law in a way probably in conflict with applicable local decisions and statute; and in a way in conflict with decisions of the Supreme Court of the United States which decisions are themselves in conflict with each other.

This Petition, with supporting brief, is being filed within ninety days after the filing of the opinion of the United States Court of Appeals.

QUESTION PRESENTED.

The question presented is whether the Court of Appeals erred in holding that the United States District Court for the District of Colorado, where the action is pending, has to proceed with the trial under the opinion of the Court of Appeals which holds that the laws of Utah shall prevail, disregarding the Colorado statutory limit of $5,000, which limit has been by the Colorado statute and decisions, declared to be the public policy of Colorado, the violation of which would be repugnant, and abhorrent to, and incompatible with, the fixed and declared public policy of Colorado, of which the United States District Court for the District of Colorado, and the United States Court of Appeals should take cognizance and should follow.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Respondent has chosen to invoke the jurisdiction of the United States District Court of Colorado, and has done so with full knowledge of the limitation of the Colorado law limiting the damages; yet he also seeks to invoke the benefit of Utah's unlimited damages. The Colorado Federal Court was bound to enforce the positive statute of the state where the suit is pending, Colorado, and to follow the decisions of the Colorado Supreme Court. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or general, be

they commercial law or a part of the law of torts. The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word. A federal court in a diversity case should consider itself in effect only another court of the state. A statutory limit by the law of the forum on the amount that can be recovered in a court of that state for death, irrespective of the place of wrong, should be enforced. As to the remedy, that is, the amount of damages, the law of the forum, where the action is brought or lex fori, should prevail.

To support what we have said here, we file herewith a supporting brief.

Wherefore, petitioner respectfully prays this Court to issue its Writ of Certiorari to review this case, and for all further proper orders.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949.

No. .....

BURLINGTON TRANSPORTATION COMPANY,
PETITIONER,

vs.

EARL C. STOLTZ, RESPONDENT.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

REFERENCE TO OFFICIAL REPORTS OF OPINIONS BELOW.

The opinion of the United States District Court for the District of Colorado is not reported but is found at pages 5, 6, 7, of the record. The opinion of the United States Court of Appeals is reported in 178 Federal, 2nd Series 514, and is found at pages 13, 14, 15, of the record.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

This Court's jurisdiction is invoked under Revised Rules of the Supreme Court of the United States, Rule 38, Section 5, and 5 (b) under which Petitioner contends that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions and statute; and in a way in conflict with decisions of the Supreme Court of the United States which decisions are themselves in conflict with each other.

STATEMENT OF THE CASE.

Petitioner's bus was involved in an accident in Utah, resulting in the death of Donald Stoltz, who was the son of Respondent, Earl C. Stoltz. The Respondent is a citizen of Colorado, as was deceased. Respondent sued in the United States District Court for the District of Colorado, for $25,000. The Colorado death statute limits recovery to a maximum of $5,000. The Utah constitution and statute places no limitation on the amount of damages.

Petitioner filed a motion in the District Court seeking to limit the damages to $5,000, on the grounds that the laws of Utah, upon which the action was based, were opposed to and incompatible with the declared public policy of the laws of the State of Colorado, and that any general rule of comity does not apply in view of such declared public policy of Colorado.

The District Court judge held that at the proper time he would instruct the jury that recovery, if any, cannot exceed the maximum of $5,000.

Next came the pre-trial conference where Petitioner stated that it was willing to pay $5,000 and costs, and that a trial was therefore not necessary. Judgment was accordingly entered against Petitioner for $5,000 and costs, over Respondent's objections.

Respondent appealed to United States Court of Appeals, Tenth Circuit, from the judgment limited to $5,000 and costs, where, on December 15, 1949, it was held that the laws of Utah govern the amount of damages, and the trial court was reversed and the case remanded. Thereafter, a mandate for the trial was issued, and the trial court set a further pre-trial conference for February 16, 1950. Petitioner ordered the record from the clerk of the United States Court of Appeals for the purpose of this Petition, and the pre-trial conference was vacated, but Respondent is seeking to have it reinstated.

SPECIFICATION OF ERROR.

The United States Court of Appeals erred in holding that the respondent is entitled to damages under the laws of Utah, and is not limited to the $5,000 damages being the maximum recoverable under the laws of Colorado.

ARGUMENT.

Article 16, § 5 of the Utah Constitution provides:

> "The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law."

Title 104, Chap. 3, § 10, Code of Utah, 1943, provides that a father may maintain an action for the death of a minor child, where such death is caused by the wrongful act or neglect of another.

Colorado Statutes Annotated, 1935, Chap. 50, § 2, provides:

> "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and

the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then * * * the person who, * * * if death had not ensued, shall be liable to an action for damages * * *."

Section 3 of the same title and chapter provides that: "* * * in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand (5,000) dollars * * *."

The Colorado public policy has been declared not only by the statute heretofore mentioned, but by cases construing it. Thus in Moffatt v. Tenney, 17 Colo. 189, 198, 30 Pacific 348, the Colorado Supreme Court clearly indicated that the statutory maximum reflects the public policy of the commonwealth: "* * * lest the courts should be troubled with excessive verdicts which might be supposed to rest upon a vindictive basis, they (the legislative) placed an absolute limit upon the recovery in the class of actions thus authorized."

If there is a rule of Comity permitting an action to be brought in another state, based on the substantive law of the state where the accident occurred, such rule bears with it the well recognized exception that the law of the forum where the action is pending governs as to the limitation of the amount of damages.

For many years the Federal courts held that they did not have to apply the unwritten law of the state where the suit was pending, and could disregard such laws as declared by the highest court in that state, and that the Federal Court could exercise its independent judgment as to what the common law of a state was or should be. But in the famous case of Erie Railroad Co. vs. Tomkins, 304 U. S. 64, 58 Supreme Court Reporter 817, this law which had existed since 1842 was changed. The case involved a suit for per-

sonal injuries. The accident occurred in Pennsylvania. The suit was brought in the Federal court in New York. Justice Brandeis wrote the opinion. He decided that the New York Federal court was bound, as before, to enforce the positive statutes of the state where the suit was pending, but he also decided, and differently from the law existing before, that the decisions of the state court where the suit was pending should be followed by the Federal court. Speaking of the law of the state where the suit was pending, the court held: "And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or general, be they commercial law or a part of the law of torts." "The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."

The State of Colorado, by its positive statute has declared its public policy to prohibit recovery of more than $5,000 in a death case. In Turnbull v. Cole, 70 Colo. 364, 201 Pacific 887, the Supreme Court of Colorado has decided that "the contract, though valid in Utah, could not be enforced in this state, because such action would be contrary to public policy • • • ."

Opinions have changed, to support our contention, since and because of the Erie decision in 1938. In Guarantee Trust Company v. York, 326 U. S. 99, decided in 1945, the court said it would put aside abstractions regarding substance and procedure, and that a federal court in a diversity case should consider itself "in effect only another court of the state."

In Beneficial Industrial Loan Corporation vs. Smith, 170 F. (2d) 44, the court said it could not concern itself with ancient diversities between adjective and substantive law,

but that a federal court "must enforce state law and state policy."

In the case involving the Titanic sinking, Oceanic Steam v. Mellor, 233 U.S. 718, 732, 34 Sup. Ct. Rep. 754, Justice Holmes said "It is also true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose." • • • "parties resorting to our courts shall recover only to such extent or in such way as it may mark out."

The opinion of the United States Court of Appeals states at the top of page 15 of the printed record that the "amount of recovery is governed by the lex loci and not by the lex fori," citing at the bottom of page 15 of the printed record Section 391 of Restatement, Conflict of Laws, but the opinion utterly disregards the fact that in Restatement of the Law, Conflict of Laws, c. 9, Section 417, page 498, of American Law Institute, it says: "A statutory limit by the law of the forum on the amount that can be recovered in a court of that state for death, *irrespective of the place of wrong will, however, be enforced.*" (Italics ours.)

In the same volume it is said at page 723:

> "If a statute of the forum limits the amount which in any action of a certain class may be recovered in its courts, no greater amount can be recovered though under the law of the state which created this cause of action, a greater recovery would be justified or required."

And at page 723 and 724 in the same volume, it is said:

> "By a statute of state X, no more than five thousand dollars damages can be allowed in an action for the death of a human being. This has been interpreted by the courts of X to apply to all actions for death

brought in X. A court in X will refuse to allow greater recovery than five thousand dollars for a death caused in state Y, whose statute has no such limitation."

The Court of Appeals at the bottom of page 15 of the printed record refers to some state court decisions, but if such decisions are to be considered, then we submit as supporting our contention the leading case of Wooden vs. Western N. Y. R. R., 126 N. Y. 10, 26 N. E. 1050, 13 L.R.A. 458. The suit was in New York. The complaint alleged that the death was in Pennsylvania and that the statutes were similar. Judgment was demanded for $20,000. Defendant demurred. The court said the statutes were similar "but the second difference relied on is that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our State they cannot exceed $5,000. That restriction pertains to the remedy rather than the right. Dennick v. West Jersey, 103 U. S. 11, 26 L. Ed. 439. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action or its inherent elements and character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations, and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principle of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks."

It therefore appears that the cause of action itself can be based on the law of the place where the accident occurred, that is, the lex loci, but as to the remedy, that is, the amount of damages, the law of the forum where the action is brought or lex fori, prevails. So it was said in Armbruster vs. Chicago R. R., 166 Iowa 155, 147 N. W. 337. The action was brought in Iowa, for a death in Missouri. The Missouri statute is almost like Colorado's except the damages were limited

to $10,000. The court quoted with approval from Minor on Conflict of Laws: "Occasionally some point may arise under differences between the lex delicti and the lex fori as to the elements to be taken into consideration in estimating the amount of damages. Such matters pertain to the remedy, and are to be controlled by the lex fori, since they do not involve any substantive right."

The Court of Appeals in its footnote (page 15, printed record) cites Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 38 L. Ed. 958. The accident happened in Montana, the suit was in Minnesota. The court charged the jury "Many states have different laws. The law in this State until recently was that only $5,000 could be given in a case of death. It has lately been increased to $10,000." The verdict was $10,000. What the court would have done had the verdict been over $10,000 we do not know. The Supreme Court did quote from a Minnesota case, with approval, as follows: "The statute of another state has, of course, no extra-territorial force, but rights acquired under it will always, in comity, be enforced, *if not against the public policy of the laws of the former.*" (Italics ours.)

In the Babcock case the defendant had contended that "It seems this action could have been brought in either Montana or Minnesota. The party had his selection as to the forum; that being so, it is but right and proper he should have only the remedy afforded by the law of the forum of his selection. Wharton, Conflict of Law, Section 479, 747-754; Gould's Pleading, 104-112, 131, et seq.; Story, Conflict of Law, Section 556, et seq.; Nonce v. Richmond & Danville Railroad, 33 Fed. Rep. 429."

We have quoted from the opinion by Mr. Justice Holmes in the Titanic sinking case, supra, which quotation supports our contention. Yet there seems to be hopeless confusion as to what is the true rule. Thus, in Western Union v. Brown, 234 U. S. 542, 58 L. Ed. 1457-1459, Mr. Justice

Holmes said "when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort * * * and that is not only the ground but the measure of the maximum recovery." But in the same case Mr. Justice Holmes also says that "a limitation of liability may stand on different grounds", citing the abovementioned Titanic sinking case.

We cannot see any significance in the next to last paragraph of the opinion of the Court of Appeals (page 15, printed record) where it is stated that the Colorado statutory limitation does not purport to apply to actions brought under a statute of another state. The statute is silent on that subject, but surely the silence does not give consent to disobey the solemn declaration that "in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand (5,000) dollars." (Page 14, printed record.) It is plain that the language means any jury within the limits of the state. The Utah constitution and statute is silent as to where it applies, but it must mean to apply to juries in Utah. Surely the people of Utah would not presume to make law for the people and courts of Colorado!

In conclusion, we respectfully submit that this Court should issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 655

BURLINGTON TRANSPORTATION COMPANY,
Petitioner,

v.

EARL C. STOLTZ, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

STATEMENT OF THE CASE

Respondent, as plaintiff, originally filed his complaint against petitioner, as defendant, in the United States District Court for the District of Colorado stating diversity of citizenship (R. 2).

Respondent alleged that his son died in Utah as a result of injuries sustained as a passenger for hire in a bus owned and operated by petitioner, while traveling along a public

highway in an easterly direction within the state of Utah, and that the death was due to a collision of said bus and another bus also owned and operated by petitioner, proceeding in the opposite direction (R. 2, 3).

Respondent set out in his complaint, Section 5, Article 16, of the Constitution of the state of Utah, which declares that the right to recover damages for wrongful death shall never be abrogated, and prohibits the legislature from placing a statutory limit upon the amount recoverable (R. 4). Respondent also pleaded Section 10 of Chapter 3, Title 104 of the Code of Utah, 1943, which makes provision for suit for wrongful death (R. 4). (The constitutional and statutory provisions are found on pages 3, 4 of this brief).

Respondent alleged and asked general damages in the amount of $25,000.00 for the death (R. 4, 5).

At pre-trial conference, petitioner here offered that judgment might be entered in favor of the respondent in the amount of $5,000.00 and costs and contended that the amount of damages recoverable was limited to $5,000.00 by Section 3 of Chapter 50, Colorado Statues Annotated, 1935 (R. 8-9).

The District Court ruled that respondent could not recover in excess of $5,000.00 and accordingly, entered judgment in favor of respondent for $5,000.00 and costs (R. 10). Respondent appealed to the United States Court of Appeals, Tenth Circuit.

The Court of Appeals reversed (R. 13-15).

QUESTION OF THE CASE

Is the amount of damages recoverable for the wrongful death in Utah limited by the Colorado statute?

SUMMARY OF ARGUMENT

I. The constitution and statutes of the state of Utah govern the amount recoverable as well as the right to recover.

II. The statute of Colorado limiting to $5,000 the amount recoverable for wrongful death in Colorado has no application when the death was caused in Utah.

III. Application of the Colorado limitation in this case would deny full faith and credit to the Utah Constitution and statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah

Section 5 of Article 16 of the Constitution of the State of Utah is worded as follows:

> The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

Section 10 of Chapter 3, Title 104 of the Code of Utah, 1943, is worded as follows:

> Except as provided in Chapter 1, of Title 42, a father, or, in case of his death or desertion of his family, the mother, may maintain an action for the death or injury of a minor child, ...

Colorado

The Colorado statutes to be considered are as follows:

> *Action notwithstanding death.*—Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the

party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured. Sec. 2, Ch. 50., C.S.A. 1935.

Damages not to exceed $5,000.—All damages *accruing under the last preceding section* shall be sued for and recovered by the same parties and in the same manner as provided in section 1 of this chapter, and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand (5,000) dollars, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default. Sec. 3, Ch. 50 C.S.A. 1935. (Italics supplied.)

ARGUMENT

I. The constitution and statutes of the state of Utah govern the amount recoverable as well as the right to recover.

It is elementary that there was no action at common law for wrongful death (Am. Law Inst. Restatement-Conflict of Laws, Sec. 390).

Respondent contends that the right of action is purely statutory. The Utah statute gives the right of action and the Utah constitution prohibits any legislative limit on the amount of damages recoverable for wrongful death in Utah. Together, the constitution and statute are the controlling law (Restatement-Conflict of Laws, Secs. 391, 392).

The American Law Institute has stated the principle as follows: "The law of the place of wrong governs the amount

of recovery for wrongful death as well as the right to recover." (Restatement-Conflict of Laws, Sec. 391, d.).

The case of *Northern Pacific* v. *Babcock*, 154 U.S. 190, appears to be the leading one on the question, squarely in point and consistently followed.

In the Babcock case, plaintiff as administrator, sued in the Circuit Court of the United States for the District of Minnesota asking $25,000 damages for the death of one Monroe who was killed in the territory of Montana. Plaintiff recovered a verdict for $10,000 and judgment was entered thereon. At the time of the death of Monroe, the statute of the state of Minnesota limited the amount recoverable for wrongful death in Minnesota to $5,000. There was no limit in Montana where the death was caused. The opinion clearly indicates that the appeal was directly upon the question of whether or not the $10,000 judgment could stand in the face of the $5,000 limit in the state of Minnesota. This Court affirmed, the opinion stating that since "the accident occurred in that state (Montana) .... We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*." *Northern Pac. R. Co.* v. *Babcock*, 154 U.S. 190, 198-199.

Mr. Justice Holmes speaking for the Court said:

> When a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort . . . and that is not only the ground *but the measure of the maximum recovery.* (Italics supplied.)
>
> *Western Union* v. *Brown*, 234 U.S. 542.

Again the Court speaking by Mr. Justice Holmes said:

> But as the only source of this obligation is the law of the place of the act, it follows that that law determines,

> not merely the existence of the obligation (Smith v. Condry, 1 How. 28, 11 L.Ed. 35) but equally determines its extent.
>
> *Slater* v. *Mexican National R. Co.*, 194 U.S. 120, 126.

As late as March 14, 1949, the Court restated the "settled principle" that "the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred." *Black Diamond S. S. Corp* v. *Stewart & Sons.* 336 U.S. 396.

II. The statute of Colorado limiting to $5,000 the amount recoverable for wrongful death in Colorado, has no application when death was caused in Utah.

A. The Colorado General Assembly made no attempt to limit recovery in Colorado for injuries beyond its borders.

Section 3, of Chapter 50, Colorado Statutes Annotated, 1935, surely shows that the legislative body was intending the limitation only when the wrongful death was caused in Colorado. The wording is, "all damages accruing under the last preceding section . . . . " The last preceding section, of course, is section 2 (brief p. 3, 4).

The late Mr. Justice Van Devanter while a Judge of the Eighth Circuit Court of Appeals properly construed the statute when he said:

> In other words *the statute relates only to wrongs done within the state,* imposes no duties upon any one not subject to its jurisdiction, and gives a right of action to persons without its jurisdiction only when they are injured by a wrong done within its jurisdiction. (Italics supplied.)
>
> *Patek* v. *Am. Smelting & Ref. Co.*, 154 Fed. 190, 194.

It is known that the statutes of some states are worded so they are construed to restrict the power of a state court to enter judgment for death in excess of a certain sum, regardless of where the wrong was done. Under such a statute, the amount of a judgment of a state court is limited whether the action is brought under the statute of that state or under the statute of any other state. (Restatement-Conflict of Laws, Sec. 606.).

The Colorado statute is not that kind. The Colorado limitation is applicable only in actions "accruing under the last preceding section . . . . " Surely the situation in this suit is squarely within illustration "1" of the Restatement, page 723, which follows:

> 1. In a statute of state "x", it is provided that in any suit brought under this statute for damages for death not more than five thousand dollars can be recovered. Action is brought in "x" for a death in state "y" under a statute of "y" by which ten thousand dollars may be recovered for death. The court interprets the statute of "x" as applicable only to causes of action arising under the statute of "x", and holds that in this case the damages are not limited to the amount of five thousand dollars.

It is submitted, that the opinion by Chief Judge Phillips below, states the law with exactness:

> The Colorado wrongful death statute does not attempt to give a right of action for wrongful death committed outside of Colorado, and the limitations in § 3 of Chap. 50, supra, by its terms is applicable only to actions based on § 2 of Chap. 50, supra. It does not purport to apply to actions brought for wrongful death under a statute of another state. Neither is there anything in the Colorado statute which indicates that Colorado regards full compensatory damages for wrongful death committed outside of Colorado to be contrary to good morals or

natural justice, or violative of the public policy of Colorado. (R. 15).

Stoltz v. *Burlington* 178 F. (2d) 514, 515.

B. The Colorado Supreme Court has never construed the limitation to have extra-territorial effect.

It is recognized that for some purposes the United States District Court is just another Colorado state court. *Guaranty Trust Company* v. *York*, 326 U.S. 99. But *Erie R. R. Co.* v. *Tompkins* 304 U.S. 64, again emphasized the rule stated in the first sub-division of this brief, that it is the law of the state where the injury occurs which must be applied. It need not again be said that the Erie case was filed in the United States District Court for the Southern District of New York and the Court sent the case back for the trial court to determine the Pennsylvania law where the injury occurred. It is respectfully submitted that in consideration of the issue here, the United States District Court in Colorado is just another Utah state court.

Petitioner in its brief, page 8, mentions the case of *Moffatt* v. *Tenney*, 17 Colo. 189. That action was for the death of a husband, killed in a mine shaft in Lake County, Colorado. It was not a suit on a statute of another state. Counsel accurately quotes the court in that case in saying that the legislature placed a limit upon the recovery in the class of actions thus authorized. But the Colorado statute, then as now, contained the words which are omitted from the quotation in petitioner's brief (p. 8) ; namely, "all damages accruing under the last preceding section, ... " It seems very plain that our State Supreme Court has considered the limitation in Section 3 of Chapter 50 to apply only when the wrongful death was caused within the state of Colorado.

Respondent does not concede that the United States District Court would be bound, if the Colorado Court had construed the limitation statute as prohibiting judgment in excess of $5,000 for wrongful death in another state. However, no such construction by the Colorado Supreme Court is shown.

A case did go to the Colorado Supreme Court in which the widow of a brakeman on the D. & R. G. Railroad was killed in the state of New Mexico. The Colorado Supreme Court, in that case, applied the New Mexico law in two respects which, to us, indicates that the question here would be resolved by the Colorado Supreme Court in favor of the respondent. In that case the widow was allowed to bring the suit as administratrix. The Colorado statute provides that the widow, as such, may sue (Sec. 1, Ch. 50, C.S.A., 1935). The Colorado Supreme Court said that section 3218 of the New Mexico statute provides in substance that the action shall be brought by the personal representative. That court also ruled that the fund recovered should be,

> distributed to the persons entitled to it under the statute of the place where the cause of action arose, rather than to the persons who would be entitled according to the statute of the forum.
>
> *D. & R. G. R. R. Co.* v. *Warring* 37 Colo. 122, 130, 86 Pac. 305.

C. Recovery under Utah law would not be against the public policy of Colorado.

No Colorado state court is shown to have declared that it would be contrary to the public policy of Colorado, to permit recovery of more than $5,000 for a death wrongfully caused in another state. In view of *D. & R. G. R. R. Co.* v. *Warring, supra,* it seems only logical that the Colorado Supreme Court would rule as respondent contends.

The Colorado case of *Turnbull* v. *Cole*, 70 Colo. 364, 201 Pac 887, cited in petitioner's brief page 9, was not a wrongful death case, but was concerned with a conflict in the laws of the two states regarding valid liens upon chattels.

In any event to be held contrary to public policy, the foreign statute must violate some principle of natural justice, be against good morals or prejudicial to the general interests of the citizens of the forum. *Northern Pacific R. Co.* v. *Babcock* 154 U.S. 190, 38 L.Ed. 958. *Lauria* v. *E. I. DuPont De Nemours & Co.* 241 Fed. 687, 692-693. *Curtis* v. *Campbell*, 76 F. (2d) 84. No such condition exists here.

III. Application of the Colorado limitation in this case would deny full faith and credit to the Utah Constitution and Statute.

Petitioner seems to admit that the respondent has a cause of action based upon the Utah Constitution and Statute, but claims that the amount recoverable is limited by the Colorado statute. This position seems not only irrational, but contrary to the provisions of Article IV, Section 1, of the United States Constitution.

The respondent contends that the United States District Court for the District of Colorado could not be controlled, even if the Colorado statutes clearly limited the amount recoverable in the Colorado state courts, when the death was wrongfully caused without the state of Colorado.

While no decision has been found which directly holds that in tort cases, the full faith and credit clause requires the enforcement of the *lex loci delicti*, in the courts of another state, nevertheless, it appears from a decision of this Court in which Mr. Justice Brandeis wrote the opinion, that where a tort action exists purely because of a statute of the state

where the injury occurred, the "full faith and credit" clause of the Constitution requires the courts of other states to make effective such statutory provisions.

In the opinion it is said:

> Liability for a tort depends upon the law of the place of the injury; and (apart from the effect of the full faith and credit clause, which is not here involved) agreements made elsewhere cannot curtail the power of a state to impose liability for injuries within its border.
>
> *Young* v. *Masci*, 289 U.S. 253.

Presumably, the Court in that opinion, meant that the "full faith and credit" clause was not involved, because the New Jersey Courts had given full faith and credit to the New York statute. If the New Jersey Court had denied relief then, surely the decision of the Court would have said that the "full faith and credit" clause had been violated.

In this case there is no conflict in claims of citizens of Colorado under Colorado statutes, with claims of citizens of Utah under the Utah statutes. This is not a situation in which injury will be done generally to the citizens of the state of Colorado, nor to any citizen of the state of Colorado, by giving full faith and credit to the Utah statute and constitution.

While the cases deal with contractual rights and obligations, in *Broderick* v. *Rosner*, 294 U.S. 629, and in *John Hancock Mut. L. Ins. Co.* v. *Yates*, 299 U.S. 178, the Court required "full faith and credit" even though the statute of the forum was contrary to the *lex locus contractus* and the suits originated in state courts.

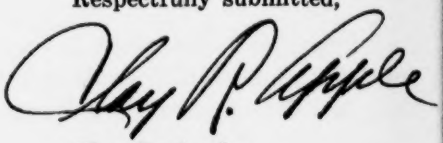
Since respondent is a Colorado citizen, asking relief under the Utah law, and petitioner is an Illinois corporation, there would seem to be even more reason that in the United States

District Court for Colorado, "full faith and credit" should be given the constitutional and statutory provisions of the state of Utah, the place of the wrongful death.

CONCLUSION

It is earnestly urged that the decision of the Court of Appeals be affirmed and that the petition for certiorari be denied.

Respectfully submitted,



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